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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP2397, 2020AP112

STATE OF WISCONSIN ex rel.
TIMOTHY ZIGNEGO, DAVID W. OPITZ,
and FREDERICK G. LUEHRS, III,

Plaintiffs-Respondents-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION,
MARGE BOSTELMANN, JULIE
GLANCEY, ANN JACOBS, DEAN
KNUDSEN, AND MARK THOMSEN,

Defendants-Appellants.

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, APPEAL FROM FINAL ORDERS ENTERED BY THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE PAUL V. MALLOY, PRESIDING

RESPONSE BRIEF OF DEFENDANTS-APPELLLANTS

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INTRODUCTION

The Wisconsin Elections Commission (the "Commission") received information from a large data source compiled from driving and postal records, indicating that certain registered electors may have moved. The Commission sent out letters to those electors informing them of that information so that, if appropriate, those voters could make changes to their registration.

One month after the letters were mailed, three Petitioners filed this lawsuit seeking deactivation of the registrations of over 200,000 voters who did not respond to the mailing. They argue that an election law—Wis. Stat. § 6.50(3)—requires the Commission to summarily purge these electors from the rolls without an inquiry into whether any specific voter in fact has moved. However, as the court of appeals correctly recognized, the statutory text allows for nothing remotely like that.

Most basically, the subsection does not pertain to the Commission. Rather, subsection 6.50(3) requires local entities to make a fact-specific determination about whether a particular voter has moved within or outside of a municipality for voting purposes. Likewise, that subsection only gives local entities power to deactivate a voter's registration. The terms used in that subsection are no fluke. Over and over in the statutes, certain terms are used to refer to the Wisconsin Elections Commission and certain different terms refer to local election entities. To read subsection 6.50(3) as applying to the Commission throws out the statutes' text entirely.

And even without that threshold misapplication, the statute would not apply as proposed by Petitioners. They do not meaningfully apply the statute's substantive "reliable information" standard. They have not attempted to show that

any particular voter's move is "reliable," as would be required to even begin an analysis under that plain text. That is especially concerning because it is a fact that the data they seek to use for mass deactivation is not always accurate on a voter-by-voter level.

Petitioners also lack standing to lodge the mass deactivation challenge here. Rather, individual electors seeking to challenge another elector's registration must prove it beyond a reasonable doubt in a fact-finding proceeding before a local body. Three individuals' vague concerns about possible voter fraud if other voters are not immediately purged confer no standing. Further, those concerns are misdirected. Other Wisconsin laws are directed at fraud. In contrast, the information here is just that—information that may be useful to a voter so that the voter can change her registration, if appropriate, and keep it the same, if not. It is in this way—not through mass deactivation—that the data is used to improve the accuracy of the voter rolls.

The circuit court failed to apply the plain terms of the statute, and its writ of mandamus and related contempt order were issued in error. The court of appeals corrected those errors, and this Court should affirm that decision.

ISSUES PRESENTED

1. Did the circuit court properly issue a writ of mandamus ordering the Commission to comply with subsection 6.50(3) and deactivate voter registrations on a mass scale, when subsection 6.50(3) does not apply to the Commission and requires a discretionary reliability determination about a particular voter?

The circuit court answered yes.

The court of appeals answered no.

This Court should answer no.

2. Did the Petitioners have standing or a statutory right to bring their mass-deactivation challenge?

The circuit court answered yes.

The court of appeals assumed, without deciding, that Petitioners had standing to bring their complaint in the circuit court.

This Court should answer no.

3. Did the circuit court properly find the Commission in contempt for failing to comply with the writ of mandamus, when the Commission sought and was granted a stay of the writ and when the writ itself was unclear?

The circuit court answered yes.

The court of appeals answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case is appropriate for both oral argument and publication. While this case can be resolved using well-established principles of statutory construction, oral argument is appropriate and necessary given that the relief Petitioners propose would have significant impacts.

STATEMENT OF THE CASE

I. Statutory scheme

The Wisconsin Elections Commission is a state entity responsible for administering certain election laws in the state. Wis. Stat. §§ 5.05, 15.61. In the election laws, references to the Commission are specifically defined: the term "'commission' means the elections commission." Wis. Stat. § 5.025; *see also* Wis. Stat. § 12.01(2).

Among other duties, the Commission is responsible for compiling and maintaining electronically an official voter registration list. Wis. Stat. §§ 5.05(15), 6.36(1). The list is maintained electronically on WisVote, the statewide election management and voter registration system. (R. 23:2.)

Wisconsin Stat. § 6.50 addresses revision of the registration list by particular entities, which are separately addressed in each of its subsections. Depending on the circumstances, Commission employees, municipal clerks, boards of election commissioners, and authorized election officials[1] may make changes to the list when the statutes allow for revisions. Wis. Stat. §§ 6.36(1)(b)1.b., (1)(c), 6.50, 7.20(1).

Wisconsin Stat. § 6.50(1)–(2r) describe the Commission's revision authority. Those subsections address changes to a voter's registration status when he has not voted in the previous four years. Pursuant to subsection (1), the Commission is required to "examine the registration records for each municipality . . . and each elector who has not voted within the previous 4 years" and mail a notice to that elector notifying them that their registration will be suspended unless they apply for continuation of registration within 30 days. Then, under subsection (2), "the commission shall change the registration status of that elector from eligible to ineligible on the day that falls 30 days after the date of mailing." Wis. Stat. § 6.50(2).

Powers and duties of other entities are set out in Wis. Stat. § 6.50(3)–(6). Those subsections describe the duties and authority of "the municipal clerk" and "board of elections

[1] The commissioners of the Wisconsin Elections Commission are not "election officials." *See* Wis. Stat. §§ 7.30 (describing qualifications of election officials), 7.33 (describing duties of election officials).

commissioners" regarding changes to an elector's voter registration status. Subsection (7) states that whenever one of those entities changes an elector's registration status from eligible to ineligible, the entity must make an entry on the list, indicating the date and reason for the change. To that end, the statute expressly requires the list to be "designed in such a way that the municipal clerk or board of elections commissioners" and individuals authorized by those entities can "add entries to or change entries on the list for any elector who resides in, or who the list identifies as residing in, that municipality and no other municipality." Wis. Stat. § 6.36(1)(c).

The municipal clerk and board of elections commissioners are exclusively responsible for making additions and changes to the registration list under subsections (3)–(6), although the Commission may provide technical assistance to the local entities if requested. (R. 4:25–44; 23:3, 8, 9.) For example, if the municipal clerk or board of elections commissioners learn from vital statistics reports that someone within that municipality has died, those local entities are authorized to change the deceased electors' registration from eligible to ineligible status. Wis. Stat. § 6.50(4).

The statutes specifically define and describe both local entities. Subsection 5.02(10) defines "municipal clerk" and subsection 7.15(1) states that "[e]ach municipal clerk has charge and supervision of elections and registration in the municipality." Sections 7.20–7.22 establish boards of elections commissioners for certain cities and counties and sets out their duties and authority. Subsection 7.20(1) states in relevant part: "**Board of election commissioners. (1)** A municipal board of election commissioners shall be established in every city over 500,000 population. A county board of election commissioners shall be established in every

county over 750,000 population." When a municipality or county has a "board of elections commissioners," "all powers and duties assigned to the municipal or county clerk" are "carried out" by the board of elections commissioners or its executive director. Wis. Stat. § 7.21(1).

Wisconsin Stat. § 6.50(3)—the only subsection at issue in this case—addresses revision to the registration list when "the municipal clerk or board of election commissioners" determines there is reliable information that an individual elector has changed her residence. Subsection 6.50(3) reads in full:

> Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or board of election commissioners shall notify the elector by mailing a notice by 1st class mail to the elector's registration address stating the source of the information.
>
> All municipal departments and agencies receiving information that a registered elector has changed his or her residence shall notify the clerk or board of election commissioners.
>
> If the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or board of election commissioners shall change the elector's registration from eligible to ineligible status.
>
> Upon receipt of reliable information that a registered elector has changed his or her residence within the municipality, the municipal clerk or board of election commissioners shall change the elector's registration and mail the elector a notice of the change.
>
> This subsection does not restrict the right of an elector to challenge any registration under s. 6.325, 6.48, 6.925, 6.93, or 7.52(5).

Wis. Stat. § 6.50(3) (format changed for readability).

Outside of section 6.50, separate statutes provide procedures for one elector to challenge another elector's registration status. Wisconsin Stat. § 6.48 provides that "[a]ny registered elector of a municipality may challenge the registration of any other registered elector." In turn, Wis. Stat. § 6.325 provides that "[n]o person may be disqualified as an elector unless the municipal clerk, board of election commissioners or a challenging elector under s. 6.48 demonstrates beyond a reasonable doubt that the person . . . is not properly registered."

II. Relevant factual background

In 2015, the Legislature enacted a law directing Wisconsin to join the Electronic Registration Information Center, Inc. (ERIC). *See* Wis. Stat. § 6.36(1)(ae); (R. 23:3.) ERIC is a nonprofit consortium of states that share data about voters to help member states improve their voter registration systems. (R. 23:4.) ERIC helps its member states identify people who may be eligible to vote but are not registered, voters who may have moved since their last registration date, voters who are deceased, and voters who may no longer be eligible to vote. ERIC does this by comparing data about registered voters with information from other sources, like the Division of Motor Vehicles (DMV) and the United States Postal Service (USPS). (R. 23:4.)

The ERIC Membership Agreement requires member states to transmit data relating to registration of electors in their state to ERIC for sharing within the state and with other member states. (R. 23:4; 24:1–2.) Upon receiving data from ERIC, member states must initiate contact with electors who may be eligible to vote but are unregistered and inform them how to register to vote. (R. 23:5; 24:4–5.) And member states must also initiate contact with voters whose records may be inaccurate. (R. 23:5; 24:5.)

While the Agreement requires member states to reach out to voters appearing on the list maintenance reports, it does not mandate a process or timeframe for removal of the person from the voter registration list. (R. 23:5; 24:5.) Likewise, Wisconsin's law directing the Commission to enter into a membership agreement with ERIC does not require deactivation of voter registrations, nor does it cross-reference the subsections requiring revision of the registration list, including Wis. Stat. § 6.50(3). *See* Wis. Stat. § 6.36; (R. 23:3–4; 24.)

Every two years, Wisconsin receives a report from ERIC regarding persons who are sometimes referred to as "Movers." (R. 23:4–6.) ERIC Movers are Wisconsin residents who, in an official government transaction with, for example, the DMV or the USPS, reportedly have stated an address different from their voter registration address. (R. 23:4–5.)

After receiving the first report on ERIC Movers data in 2017, the Commission mailed postcards to the identified electors directing them to reregister if they had moved or to sign and return the card to the municipal clerk or board of elections commissioners to keep their registration current. (R. 23:5–6.) The Commission stated that the voters had 30 days in which to respond to keep their registration active. (R. 23:6.)

Based on its experience with the 2017 Movers mailing, the Commission learned that some percentage of that ERIC data was not a reliable indicator of whether an elector changed her voting residence, although the precise percentage is not currently established. (R. 4:8–12; 23:5–10.) For example, the Commission learned that some voters flagged as ERIC Movers had simply registered a vehicle or obtained a driver license at an address other than their voting address and did not intend to change their voting residence. (R. 4:9; 23:7.) The deactivation of elector registrations under

these circumstances caused numerous problems and resulted in reactivation of the registrations of electors who may have been deactivated in error. (R. 4:8–12; 23:5–10.)

In 2019, the Commission received another report on Movers data from ERIC. (R. 23:10.) This time, the Commission revised its process. (R. 23:10.) In October 2019, the Commission sent letters to approximately 230,000 "Movers." (R. 23:10.) The letters asked the elector to affirm whether she still lived at that address. If the voter affirmed that she had not moved, then she would remain in active status on the voter rolls at that address. (R. 23:10–11.) The letter did not include notice that the elector's registration would be deactivated as a result of a non-response. (R. 23:10.) To the contrary, the letter told the elector that simply voting would maintain her status. (R. 23:10–11.)

For the electors who do not respond to the October 2019 mailing, the Commission decided that it would take no immediate action, but rather would seek guidance from the Legislature to the extent further action was contemplated. (R. 23:11; 52:1–2.) However, the information derived from ERIC reports is flagged on WisVote so that local entities can consider it when potentially updating local voters' registrations, if warranted. *See* Wis. Stat. § 6.36(1)(c); (R. 4:25–44.)

As of May 2020, of the 230,000 electors who were sent the October 2019 mailing, 4709 (2%) had confirmed that they had not changed their voting residence by responding to the mailing or affirming their address at the polls. (Pet. App. 208.) Approximately 130,000 electors who were sent the mailing (about 55%) had not provided any information one way or the other, meaning they had not confirmed their registration, registered at a new address, or voted in an election. (Pet. App. 208.)

III. Litigation history

On November 13, 2019, the three Petitioners filed suit against the Commission and five of its six commissioners in their official capacities. (R. 1:4–5.) Petitioners alleged the Commission violated subsection 6.50(3) by not deactivating the registrations of those electors who did not respond within 30 days after the October 2019 mailing. They sought declaratory and injunctive relief or, in the alternative, a writ of mandamus. (R. 1:3–18.)

Before the Commission's answer deadline, Petitioners filed a motion for a temporary injunction or writ of mandamus. (R. 2–4.) In a December 13, 2019, oral ruling, the circuit court ruled that a writ of mandamus would issue to compel the Commission to comply with the statute. (R. 131 (Mot. Hr'g. Tr. 76:12–16, Dec. 13, 2019).)

On December 17, 2019, the circuit court entered a written writ, which ordered: "Defendant Wisconsin Election Commission is hereby ordered to comply with the provisions of § 6.50(3) and deactivate the registrations of those electors who have failed to apply for continuation of their registration within 30 days of the date the notice was mailed under that provision." (R. 77.)

The Commission immediately filed a notice of appeal and a motion for expedited stay, and then repeatedly sought a ruling on the stay while it was pending. (R. 79; 103; 105–9.) Despite these efforts, Petitioners returned to the circuit court and filed a motion for contempt and remedial sanctions against the Commission and certain commissioners. (R. 93.) On January 13, 2020, the circuit court found the Commission and three commissioners in contempt and issued an order imposing a remedial sanction of $250 per day against the three commissioners and $50 per day against the Commission

until they complied with the writ. (R. 132 (Mot. Hr'g. Tr. 32:23–34:19, Dec. 13, 2019).)

The next day, the court of appeals granted the Commission's motions to stay the writ of mandamus and the contempt order. (R. 124; 125.)

IV. The court of appeals' decision and reasoning

The court of appeals reversed the writ of mandamus and remanded to the circuit court for dismissal of Petitioners' complaint primarily "because the plain language of § 6.50(3) neither refers to the Commission nor places any duties on the Commission." *Zignego v. Wis. Elec. Comm'n*, 2020 WI App 17, ¶ 3, 391 Wis. 2d 441, 941 N.W. 2d 284 ("Ct. App. Decision").

The court first concluded that subsection 6.50(3) does not apply to the Commission. The court reasoned that subsection 6.50(3) "makes no reference to the 'commission' and only refers to 'the municipal clerk or board of election commissioners' as the governmental bodies that have statutory duties pursuant to that statutory subpart" and the Commission is not a "board of election commissioners." (Ct. App. Decision ¶¶ 3, 51, 71.) The court reached this conclusion by analyzing the definitions of the relevant terms and their uses throughout the election laws and within subsection 6.50(3). (Ct. App. Decision ¶¶ 51–71.) The court further rejected Petitioners' arguments that the Commission's past conduct and its duty to merely maintain the registration list empowered it to deactivate voters' registrations under subsection 6.50(3). (Ct. App. Decision ¶¶ 72–92.)

The court also addressed an additional basis for reversal. It concluded that if, for argument's sake, subsection 6.50(3) applied to the Commission, it had no "positive and plain" duty to deactivate voter registrations because the determination of whether voter residence information is

"reliable" under the statute is discretionary and, thus, not the proper subject of mandamus. Moreover, the reliable information standard is applied voter-by-voter, not as a group. (Ct. App. Decision ¶¶ 93–100.)

Although it did not need to reach the issue and so did not rule on it, the court further noted that "Plaintiffs have not made any discernible argument in their briefing in this court on the question of standing." (Ct. App. Decision ¶¶ 23–27.) In addition, the court vacated the contempt order. (Ct. App. Decision ¶¶ 4, 101–107.)

STANDARD OF REVIEW

This Court reviews a decision to issue a writ of mandamus for an erroneous exercise of discretion. *Lake Bluff Hous. Partners*, 197 Wis. 2d 157, 170, 540 N.W.2d 189 (1995). A circuit court's "discretion in issuing a writ of mandamus is erroneously exercised if based on an erroneous understanding of the law." *Id.*

This Court reviews questions of statutory interpretation de novo. *League of Woman Voters of Wis. v. Evers*, 2019 WI 75, ¶ 13, 387 Wis. 2d 511, 929 N.W.2d 209. This Court also reviews questions of standing, jurisdiction, and competency de novo. *Krier v. Vilione*, 2009 WI 45, ¶ 14, 317 Wis. 2d 288, 766 N.W.2d 517; *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 7, 273 Wis. 2d 76, 681 N.W.2d 190.

This Court reviews the circuit court's use of its contempt power for an erroneous exercise of discretion. *Topolski v. Topolski*, 2011 WI 59, ¶ 27, 335 Wis. 2d 327, 802 N.W.2d 482.

ARGUMENT

The circuit court's writ of mandamus was issued in error. Subsection 6.50(3) does not impose a clear, unequivocal, non-discretionary duty on the Commission, as required for a writ of mandamus. In fact, subsection 6.50(3) does not apply to the Commission or to these circumstances at all.

First, subsection 6.50(3) applies only to "the municipal clerk and board of elections commissioners," both of which are defined local entities and neither of which includes the statewide Commission, which also is separately defined. The Commission can have no duty, much less an unequivocal one, under a statute that does not even apply to it.

Second, subsection 6.50(3) does not apply to these circumstances. Local deactivation of an elector's registration under subsection 6.50(3) is triggered *only* when there is "reliable information that a registered elector has changed his or her residence to a location outside of the municipality." This standard requires a determination applied on a voter-by-voter basis. It does not permit mass-deactivation of voter registrations, let alone without looking at specific data about a particular voter to see if that data is "reliable" as to that voter.

Relatedly, Petitioners have no right to request mass deactivations under subsection 6.50(3). Rather, when an individual elector wishes to challenge another elector's eligibility, he must follow the statutory path for such challenges. That comes with a beyond-a-reasonable-doubt burden of proof and the opportunity for the challenged voter to be heard.

"Only the written word is the law." *Bostock v. Clayton County*, No. 17-1618, 2020 WL 3146686, at *3 (U.S. June 15, 2020). Subsection 6.50(3) is the law, and it does not support the relief Petitioners request here.

I. The writ of mandamus was issued in error.

This appeal is of a writ of mandamus. "In order for a writ of mandamus to be issued, four prerequisites must be satisfied: '(1) a clear legal right; (2) a positive and plain duty; (3) substantial damages; and (4) no other adequate remedy at law.'" *Voces De La Frontera, Inc. v. Clarke*, 2017 WI 16, ¶ 11, 373 Wis. 2d 348, 891 N.W.2d 803 (citation omitted).

"[M]andamus will not lie to compel the performance of an official act when the officer's duty is not clear and requires the exercise of judgment and discretion." *Beres v. City of New Berlin,* 34 Wis. 2d 229, 231–32, 148 N.W.2d 653 (1967). "[I]t is an abuse of discretion to compel action through mandamus when the duty is not clear and unequivocal and requires the exercise of discretion." *Law Enf't Standards Bd. v. Vill. Of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89 (1981) (citations omitted).

These standards were not met here for multiple reasons, including that the subsection does not even apply to the Commission.

A. Subsection 6.50(3) does not apply to the Commission.

1. The Commission is not a "board of election commissioners."

There is a fundamental flaw with Petitioners' theory: the statutory subsection on which they rely—subsection 6.50(3)—does not apply to the Commission. It thus cannot form the basis for an order against the Commission, much less a mandamus order.

"Statutory interpretation starts with the text of the statute." *Rock-Koshkonong Lake Dist. v. DNR*, 2013 WI 74, ¶ 127, 350 Wis. 2d 45, 833 N.W.2d 800. If the language is plain, the inquiry stops. *State ex rel. Kalal v. Circuit Court for*

Dane Cty., 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* ¶ 45. Further, language is interpreted in context and in light of "surrounding or closely-related statutes." *Id.* ¶ 46. "[T]he court is not at liberty to disregard the plain, clear words of the statute." *Id.* ¶ 46 (quotation omitted).

Subsection 6.50(3) reads in relevant part: "Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, *the municipal clerk or board of election commissioners* shall notify the elector . . . . If the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, *the clerk or board of election commissioners* shall change the elector's registration from eligible to ineligible status." Wis. Stat. § 6.50(3).

Unlike other subsections in section 6.50 that expressly refer to the Commission, subsection (3) makes no reference to the Commission; it only refers to the "municipal clerk and board of election commissioners" as the governmental bodies that have duties under the statute. Despite this, Petitioners contend that the Commission is the "board of election commissioners" as that phrase is used in subsection 6.50(3). It clearly is not.

The Wisconsin Elections Commission and the "board of election commissioners" are separate and distinct governmental entities with separate and distinct duties, as comprehensively described in the election laws. In other words, both are "technical or specially-defined" terms in the statutes. *See Kalal*, 271 Wis. 2d 633, ¶ 45 ("technical or

specially-defined words or phrases are given their technical or special definitional meaning").

The term "board of elections commissioners" is defined and described in Wis. Stat. § 7.20. It describes entities in certain municipalities and counties: "**Board of election commissioners. (1)** A municipal board of election commissioners shall be established in every city over 500,000 population. A county board of election commissioners shall be established in every county over 750,000 population." It likewise provides for the county executive or the mayor to select members who reside in that county or city. Wis. Stat. § 7.20(2)–(3). A board of election commissioners is, therefore, a local entity comprised of local officials.

The Wisconsin Elections Commission has a wholly separate statutory definition. By statute, the Wisconsin Elections Commission is an independent state agency consisting of members appointed by various state officials, such as the governor, speaker of the assembly, and senate majority leader. *See* Wis. Stat. §§ 15.02(2), 15.61(1)(a)1.–6. The Commission has specific duties assigned by the Legislature. *See* Wis. Stat. § 7.08. In fact, the Legislature has stated in clear terms how it will refer to the Wisconsin Elections Commission in the election laws, including in chapter 6: "**Elections commission; definition.** In chs. 5 to 10 and 12, 'commission' means the elections commission." Wis. Stat. § 5.025; *see also* Wis. Stat. § 12.01(2). In Wisconsin's election laws, the term "commission," alone, means the Wisconsin Elections Commission.

These different uses of those terms pervade the statutes. There are more than one hundred instances in the election laws in which the term "commission" is used, and there are more than one hundred other instances in which the term "board of election commissioners" is used. They are

different terms, each with specially-defined meanings, compositions, and duties. They are not interchangeable.

The statute addressing revision of the registration list, section 6.50, illustrates this point because it separately uses those terms. On the one hand, there is subsection 6.50(1)–(2)'s four-year voter maintenance process: it is done by "*the commission,*" not any other entity. In subsection (1), "*the commission* shall examine the registration records of each municipality" and "mail a notice to the elector." Wis. Stat. § 6.50(1). Under subsection (2), if an elector who was mailed a "notice of suspension" under the four-year maintenance process in subsection (1) does not respond, "*the commission* shall change the registration status . . . from eligible to ineligible." Wis. Stat. § 6.50(2). Subsections (1) and (2) show that the Legislature knows how to give the Commission a directive related to changing an elector's registration status: it uses the statutory term, "the commission."

On the other hand, the very next subsection in the very same statute, subsection 6.50(3), makes no mention of the "commission." It defies every principle of interpretation that the language in subsection (3) could apply to the Commission.[2]

Further demonstrating that "the commission" is not the same as the "board of election commissioners" are subsections (2g) and (7) of section 6.50. There, the Legislature uses the terms "the commission," "municipal clerk," and "board of election commissioners" *in the same sentence*, referring to them with an "or." *See* Wis. Stat. § 6.50(2g), (7) ("When an

[2] Despite numerous amendments to Wis. Stat. § 6.50, at no time was subsection (3) amended to include the "commission," even though the "commission" was added to other subsections in that statute and throughout chapter 6. *See e.g.,* 2015 Wis. Act 118, §§ 69, 76, 77.

elector's registration is changed from eligible to ineligible status, the commission, municipal clerk, or board of election commissioners shall make an entry on the registration list . . . ."). Other election statutes in chapter 6 further confirm this. For example, Wis. Stat. §§ 6.275 and 6.56(3) describe communications *between* the "board of election commissioners" and "the commission."

Those separate terms obviously refer to separate entities. "When the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings." *Pawlowski v. American Family Ins. Co.,* 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67. Here, that presumption is unnecessary because the terms are separately defined and the statutes contemplate those separate entities communicating—there is nothing to presume; it just is.

A plain-language reading of the statute shows that the Commission has no duty, much less an unequivocal one, to act under subsection 6.50(3). That is dispositive: mandamus cannot issue against an entity that is not even covered by a statute.

2. Petitioners ignore the plain language of the statute's coverage.

a. Petitioners' "ordinary parlance" and "ambiguities" arguments are irrelevant because references to the Commission and to the "board of elections commissioners" are defined.

Petitioners argue that the term "board of election commissioners" is not specially defined and that in "ordinary parlance" the term could include the Commission. (Pet'rs' Br. 10–12.) That is simply incorrect: the terms are specially-

defined and their use throughout the code belies Petitioners' proposed "parlance." This argument is misguided and irrelevant.

While the term "board of elections commissioners" is not defined in the "definitions" section of the election laws, *see* Wis. Stat. § 5.02, it is defined elsewhere. Section 7.20 sets out what a "board of elections commissioners" is: it is either a municipal or county entity. And the Commission is defined elsewhere: section 5.025 states that the "'commission' means the elections commission." The terms are separately defined and, as noted above, those separate entities interact with each other in carrying out their separate duties.

Even if the statutes did not already explicitly address this, Petitioners' argument still would not make sense. The Commission is not a "board of election commissioners" in any sense of the term. The Commission is not a "board" but rather is a "commission" as that term is defined and used in the statutes. While some independent agencies are headed by boards, *see* Wis. Stat. §§ 15.57–15.94, the Wisconsin Elections Commission is not. It is a commission "under the direction and supervision of an administrator," not a board. Wis. Stat. § 15.61(1)(b)1. And the statutory process for selecting a board to head an independent agency is entirely different than the process for selecting commissioners for the Commission. *Compare* Wis. Stat. § 15.07, *with* Wis. Stat. § 15.61.

Refusing to accept this, Petitioners point to alleged "ambiguities" in the statutory language. (Pet'rs' Br. 22–26.) They argue that the relevant statutes are "a bit of a hodgepodge" and that the term "board of elections commissioners" must be read with "flexibility." (Pet'rs' Br. 21 n.10, 25.) Even if this were true, which it is not, such "ambiguities" about the coverage of the statute would not be subject to mandamus relief. *See Beres,* 34 Wis. 2d at 231–32. Further, Petitioners' arguments are without merit.

Petitioners argue that because the statutes sometimes refer to the Wisconsin Elections Commission as the "elections commission," rather than the "commission," then the Commission could also be the "board of elections commissioners." (Pet'rs' Br. 23.) Petitioners' conclusion does not follow from their premise. It is true that the statutes sometimes use "commission" and "elections commission" interchangeably. The statutes make that explicit: section 5.025 states that the "'commission' means the elections commission." But that statute does not say that either term means "board of election commissioners" and, of course, they do not, as the term "board of election commissioners" is separately-defined and particularly-used throughout the code.[3]

Before this Court, Petitioners now go even further. They argue, for the first time, that not only should section 6.50(3) be expanded to include the Commission but also that "board of election commissioners" should be read to include the Commission in subsections (4), (5), (7), and (8) as well. (Pet'rs' Br. 23–24.) Essentially, they argue that any changes to the registration list must be completed by the Commission, despite the fact that none of these subsections refer to it. Again, there is no support for this argument in the statutory text. To illustrate, Petitioners have no explanation for subsection (7), where the statute uses the terms "the

[3] Relatedly, Petitioners argue that if "the legislature has drawn a sharp distinction between 'boards' and 'commissions' such that one can never be the other, then 'board of elections commissioners' would be an oxymoron." (Pet'rs' Br. 11.) The underlying premise for this argument is wrong. The Legislature describes both boards and commissions as having "members." *See* Wis. Stat. §§ 7.20(2), 15.06(1), 15.07, 15.61. Thus, whether an entity is a "board" or a "commission" is dependent upon the statute creating the entity, not on whether its members are referred to as board members or commissioners.

commission," "municipal clerk," and "board of election commissioners" *in the same sentence*. *See* Wis. Stat. § 6.50(7).

The tasks under subsections (3)–(6) are in reality completed by local entities, just as the statutes instruct. Petitioners point to statements made by counsel at a circuit court hearing as evidence of what the statute means. (Pet'rs' Br. 29–30.) They note that "[n]either counsel was able to point to any instance of a *municipal* clerk or *municipal* board of elections commissioners taking any action under this statute to send out notices to movers or deactivate movers who failed to respond to such notices." (Pet'rs' Br. 30.) But whether counsel could point to a specific instance—something not put at issue prior to that point—means nothing.[4] In reality, municipalities certainly do administer subsections (3)–(6), which as summarized in the background, specifically contemplate processes that are done locally based on local information. The Commission's role is merely to assist: "[T]he municipal clerk or board of election commissioners may ask the Commission staff for assistance because revisions could be numerous or the municipal clerk otherwise needs technical assistance." (R. 23:3 ¶ 10.)

Petitioners also argue that "board of election commissioners" should be read broadly because, elsewhere, a statute more specifically refers to a "*municipal* board of election commissioners." *See* Wis. Stat. § 5.40(7). But Petitioners again misunderstand the statutes. By statute, there are municipal *and* county boards of election commissioners. When a statute solely refers to the

[4] Further evidence of specific applications of subsection 6.50(3) would require factual development that had not occurred yet in this case. But the Respondents can represent that there certainly would be further evidence that municipalities do these things; that is how the system works.

"municipal" version it just means the county version is not implicated by the particular provision. *See* Wis. Stat. § 7.20.

Finally, Petitioners essentially assert that their view of the statutes should govern, despite the statutory language, because otherwise, the ERIC data goes to waste. (Pet'rs' Br. 24.) That is wrong. The Commission can and does provide the information to the voters, which empowers those voters to take action, if appropriate. (R. 23:5, 10–11; 24:5.) Further, the information from ERIC is included on WisVote, which local entities can access, when necessary. *See* Wis. Stat. § 6.36(1)(c); (R. 4:25–44.) *This* is expressly what the data is for, and *this* is how ERIC data is used to improve the accuracy of the voter rolls. (R. 23:5; 24:5.)

The text of subsection 6.50(3) is clear, and it does not apply to the Commission.

b. The Commission's duty to maintain the registration list says nothing about which entities are responsible for revision of the list.

Petitioners contend that the Commission's responsibility for "maintenance" of the registration list under a separate chapter of the statutes, in Wis. Stat. § 5.05(15), somehow implicitly amends the express terms of subsection 6.50(3), without any reference to it or its revision mechanism. (Pet'rs' Br. 13–22.) This contention is meritless.

Subsection 5.05(15) provides, in relevant part, that "[t]he commission is responsible for the design and *maintenance* of the official registration list." "Maintain" does not mean change. Just the opposite. The dictionary defines "maintain" as "to keep in an existing state." *Maintain*, Merriam-Webster, http://www.merriam-webster.com/dictionary/maintain (last visited June 28, 2020).

That the Commission is generally required to "maintain" or "keep" the registration list does not address when a revision is triggered. Rather, section 6.50 specifically addresses "revision" of the list. In other words, these two statutes do not address the same topic. And, even if they did, a general statute would yield to the more specific revision statute. *See Kramer v. City of Hayward,* 57 Wis. 2d 302, 311, 203 N.W.2d 871 (1973).

Indeed, the Commission's revision duties are specifically addressed in section 6.50 through the four-year audit process in subsections (1) and (2). Subsections (3) through (6), in contrast, require *local entities* to make revisions. Without citation, Petitioners assert that local entities only act "at the direction and instruction of [the Commission]." (Pet'rs' Br. 16 n.9.) But that is not true and also is not what the law says. Contrary to Petitioners' assertion, municipal clerks and boards of elections commissioners are expressly authorized to make changes to the registration list, and they do. *See* Wis. Stat. §§ 6.36(1)(b)1.b., (1)(c), 7.20(1).

For the first time in this case, Petitioners now argue that their counter-textual reading is necessary for the statutes to function at all. (*E.g.*, Pet'rs' Br. 18–22.) But this argument is not preserved, and it should not be considered now. *See Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177. It also is wrong.

Petitioners assert that the federal Help America Vote Act of 2002 (HAVA) somehow shows that the Commission must be required to deactivate voters under Wis. Stat. § 6.50(3). (Pet'rs' Br. 15–16, 18–22.) Petitioners correctly note that HAVA requires each state to implement "a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level." 28 U.S.C. § 21083(a)(1)(A).

What Petitioners fail to mention is that HAVA also requires states to allow "any local election official" to access and enter information on the list. 28 U.S.C. § 21083(a)(1)(A)(v)–(vii). Removal from the list must be completed in accordance with the National Voter Registration Act of 1993 (NVRA). 28 U.S.C. § 21083(a)(2). But for states, like Wisconsin, that are not subject to the NVRA,[5] "that State shall remove the names of ineligible voters from the computerized list *in accordance with State law*." 28 U.S.C. § 21083(a)(2)(A)(iii).

Wisconsin law is entirely consistent with HAVA. The statewide Wisconsin Elections Commission is responsible for the design and maintenance of the official computerized registration list. Wis. Stat. §§ 5.05(15), 6.36. Local election officials—including municipal clerks and boards of election commissioners—may access and enter information on the list. Wis. Stat. §§ 6.36(1)(b)1.b., (1)(c), 6.50, 7.20(1). And section 6.50 dictates when, and by whom, particular changes must be made to voters' eligibility status.

Petitioners assert that Wisconsin's system, where local entities make changes to the list, "would result in chaotic administration of the list and inconsistent treatment of registered voters throughout the State." (Pet'rs' Br. 15–16.) But that already is the system, and they point to no evidence of chaos. Further, this assertion is again changing the subject to reach their desired result, but that is not how the Legislature chose to craft the statutes, and for good reason—it makes sense that local entities determine when a local person has moved.

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[5] Wisconsin is not subject to the NVRA because it has election day registration. 52 U.S.C. § 20503(b)(2); Wis. Stat. § 6.55(2).

c. The Commission's past conduct has no bearing on subsection 6.50(3)'s coverage.

Petitioners argue that the Commission's past conduct demonstrates that it is required to deactivate voter registrations under subsection 6.50(3). (Pet'rs' Br. 26–29.) This argument hardly requires a response. Statutes control, not conduct.

In 2017, the Commission gave those affected 30 days to respond before deactivating.[6] (R. 23:5–6.) Putting aside its legality,[7] this process proved to be extremely problematic. For example, the Commission learned that the Movers data was *not* a reliable indicator of a change in voting residence because that data is collected for purposes other than voter registration. And registrations of many electors were reactivated. (R. 4:8–12; 23:5–10.)

More to the point here, this flawed attempt of course says nothing about subsection 6.50(3)'s coverage. Statutes control the Commission's powers. *See Koschkee v. Taylor*, 2019 WI 76, ¶ 20, 387 Wis. 2d 552, 929 N.W.2d 600 ("As we have explained, an agency's 'powers, duties and scope of authority are fixed and circumscribed by the legislature . . . .'" (citation omitted)). Conduct does not amend or augment an

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[6] In describing the Commission's past actions, Petitioners quote a March 2019 memorandum from Commission staff to the Commission generally describing the process for deactivating voter registrations under Wis. Stat. § 6.50(3). (Pet'rs' Br. 27–28 (quoting Pet. App. 168, 178 (R. 4:8, 18).) That same memorandum, however, states that there is no statutory process for determining or changing the registration status of ERIC Movers and that the Commission has sought guidance from the Legislature on the issue. (R. 4:8; 23:11; 52:1–2; 53.)

[7] These actions were not challenged in court.

administrative agency's statutory authority. *See Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶¶ 3, 84, 382 Wis. 2d 496, 914 N.W.2d 21 (ending the practice of deferring to administrative agency's conclusions of law).

The inquiry here stops with the plain text of subsection 6.50(3): it applies only to the "municipal clerk and board of election commissioners," neither of which is the Commission.

B. Subsection 6.50(3)'s "reliable information" standard does not apply to the circumstances presented here.

Wisconsin Stat. § 6.50(3) does not apply to the Commission. That ends the inquiry, but that is not the only problem with Petitioners' theory. They also fail to grapple with the substantive statutory standard of "reliable information." It does not apply to the circumstances presented here—a mass-deactivation effort based on one set of data that is not always an accurate indicator of whether a person has changed his voting residence.

1. Subsection 6.50(3) requires a judgment-based determination applied on a voter-by-voter basis.

Wisconsin Stat. § 6.50(3)'s deactivation of an elector's registration is triggered *only* when the local entity determines there is "*reliable information* that *a* registered elector has changed his or her residence to a location outside of the municipality." Wis. Stat. § 6.50(3). On its face, this standard requires a judgment-based determination applied on a case-by-case basis to a particular voter. A mandamus order requiring mass-deactivation cannot properly order that action.

"'Reliable' means something that 'can be depended upon with confident certainty.'" *State v. Champlain*, 2008 WI App 5, ¶ 28, 307 Wis. 2d 232, 744 N.W.2d 889 (quoting *Reliable*, The Random House Dictionary of the English Language 1628 (2d ed. 1987)). Thus, determining whether information is "reliable" requires an exercise of judgment or discretion. A duty is not plain if it requires discretion.

Further, the "reliable information" standard does not apply en masse. Rather, it applies on a case-by-case basis to "*a* registered elector"—in other words, to a particular voter. To further illustrate, in other statutes in chapter 6 where the term "reliable information" is used, it always applies to an individual elector. *See*, *e.g.*, Wis. Stat. §§ 6.32(2), (4) (verification of the qualifications of a "proposed elector" based on "reliable information"), 6.87(3)(b) (municipal clerk shall not send absentee ballot when there is "reliable information that an address given by an elector" is not eligible to receive such a ballot), 6.86(2)(b), 6.22(4)(f).

Here, Petitioners do not meaningfully address the substantive standard in subsection 6.50(3). Rather than assessing reliability on a voter-by-voter basis, as would be required, they simply take wholesale one data set—the ERIC Movers data—and assume it is reliable for hundreds of thousands of people, even though that data is known to be an inaccurate indicator of a change of voting residence for some percentage of voters.

ERIC Movers data is not collected or reported as a foolproof indicator that someone has changed her voting residence. It is simply a database that purports to identify Wisconsin residents who, in some sort of official government transaction, have reported an address different from their voter registration address. However, because the source data was collected for purposes *other than voter registration* and because of anomalies inherent in the data-matching process,

it is undisputed that the ERIC Movers data is not always an accurate reflection of an individual's voting residence; only the percentage of inaccuracy is in dispute. (R. 131 (Mot. Hr'g. Tr. 44:14–45:12, 55:20–23, Dec. 13, 2019); 4:8–12; 23:4–5.) A record of a government transaction revealing a different address than the elector's registration address does not necessarily mean that the elector has moved or intended to establish a new, permanent voting residence—for instance, the person may have just registered a vehicle or obtained a driver license at a different address.[8] (R. 23:4–5, 7.) In other words, it unquestionably is not something that "can be depended upon with confident certainty." *Champlain*, 307 Wis. 2d 232, ¶ 28 (citation omitted).

Petitioners did not attempt to present evidence to distinguish between voters who, for example, reported a different address for a business purpose, a temporary purpose, or some other purpose, but still permanently resided in their registered address. Likewise, they did not attempt to demonstrate that ERIC data was free from other errors. And no voter affected by the circuit court's purported "reliable information" determination was allowed a chance to demonstrate that it was not reliable.

Errors are not mere hypotheticals. It is undisputed that some ERIC data in the past has inaccurately flagged a person as having moved to a different municipality. (R. 4:8–12; 23:5–10.) And that is true of the most recent data set as well: already, with only 45% of affected voters accounted for,

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[8] "Elector residence" includes consideration of the person's physical presence and intent regarding their voting residence. Wis. Stat. § 6.10(1). The statute describes various determinations of residence. Wis. Stat. § 6.10(2)–(13). Notably, no person loses residence when she leaves home and goes to another state or another municipality within Wisconsin "for temporary purposes with an intent to return." Wis. Stat. § 6.10(5).

approximately 2% were flagged in error, suggesting an overall error of perhaps 4%, which would amount to nearly 10,000 people. (Pet. App. 208.)

To properly apply the statute, there would have to be an actual analysis of whether data supports a finding of "reliable information" as to each particular voter, which would necessarily need to consider other information to meaningfully assess "reliability."

It makes sense then that subsection 6.50(3) and its "reliability" standard applies to municipal election bodies who, unlike the Commission, are privy to local information that might inform whether information is truly reliable as to a particular voter.[9] *See* Wis. Stat. § 6.50(3) ("All municipal departments and agencies receiving information that a registered elector has changed his or her residence shall notify the clerk or board of election commissioners."). For example, when a municipal department learns via an address change for a utility or property tax bill that an elector may have moved, it must notify the municipal clerk or board of elections commissioners, which, in turn, is authorized to determine if there is sufficient information to send notice under subsection (3). Wis. Stat. § 6.50(3).

This reading of subsection 6.50(3) is also consistent with surrounding statutes. For example, the provision in chapter 6 allowing individuals to challenge voter status states that "[n]o person may be disqualified as an elector unless the municipal clerk, board of election commissioners or a challenging elector under s. 6.48 demonstrates *beyond a reasonable doubt* that the person does not qualify as an elector

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[9] Local decisions about individual voters would still not be subject to the kind of mandamus relief issued here, as second-guessing judgment calls is not what mandamus is for. *See Beres v. City of New Berlin,* 34 Wis. 2d 229, 231–32, 148 N.W.2d 653 (1967).

or is not properly registered." Wis. Stat. § 6.325. It cannot be that Petitioners' casual view of what is "reliable" is correct when related statutes require a robust "beyond a reasonable doubt" showing.

Petitioners simply have not meaningfully applied the reliability standard, which is a second, independent reason their efforts fail.

2. Petitioners ignore the plain language of the statute's substantive standard.

a. The Commission did not make a reliability determination or send notice of deactivation under subsection 6.50(3).

Rather than applying the text, Petitioners argue, counterfactually, that the Commission actually made a reliability determination. In other words, they assert that the Commission already did it, so this Court need not examine the statute. But the Commission did not determine the data was reliable under the statute and it would make no legal sense to do so, as discussed above.

Petitioners rely on the letter the Commission mailed to ERIC Movers in October 2019, asserting it embodied a "reliability" determination under subsection 6.50(3). (Pet'rs' Br. 32–33.) But that is not correct. To the contrary, in conjunction with that process, the Commission observed that the data is *not* always correct on a voter-by-voter basis, and it certainly made no finding that it was reliable under the statute.
(R. 23:5–10.)

Likewise, the October 2019 mailing was not triggered by a subsection 6.50(3) reliability determination but rather was just the informational mailing contemplated by the ERIC Agreement. (R. 23:5; 24:5.) Two features of the 2019 mailing

bear this out. First, the Commission sent the mailing to *all* Movers on the list, not just to those who moved "to a location outside of the municipality," which is the only subset covered by subsection 6.50(3). Second, the letter did not indicate that the recipients' registration would be deactivated as a result of a non-response to the letter. To the contrary, it told recipients that simply voting would maintain their status.[10] (R. 23:10–11.)

There has been no "reliability" determination by the Commission.

b. The ERIC data is not "reliable information" under subsection 6.50(3).

Petitioners raise three points that ERIC data is per se "reliable" under Wis. Stat. § 6.50(3). (Pet'rs' Br. 34.) They are wrong.

First, Petitioners argue that the fact that a statute required the Commission to join ERIC means that the data is reliable. (Pet'rs' Br. 34.) However, the statute requiring ERIC membership—Wis. Stat. § 6.36(1)(ae)—says nothing about deactivation of voter registrations based on ERIC data or whether the data is "reliable information." In fact, it does not mention subsection 6.50(3) at all. The Legislature knows how to cross-reference other statutes. If it had deemed ERIC data *per se* reliable such that deactivation was required under subsection 6.50(3), it would have said so. It did not.

[10] If subsection 6.50(3) were applied here, this lack of notice may open up the state to federal due process challenges, as alleged in the federal lawsuit *League of Women Voters of Wisconsin v. Knudson*, No. 19-cv-01029-jdp (W.D. Wis. Apr. 2, 2020). (R. 111.)

Second, Petitioners argue that because the source of the ERIC Movers data is the voters themselves, the data must be reliable. (Pet'rs' Br. 34–35.) However, the source data was collected for purposes *other than voter registration*. That a person reported a different address to the DMV or USPS does not necessarily mean that he has changed his residence for the purposes of voting. (R. 23:4–5, 7.) Thus, ERIC data does not always capture a legally significant move. Further, Petitioners assume, without support, that there were no other errors—for example, errors in writing or recording the address at the DMV or with USPS.

Third, Petitioners argue that the ERIC Movers data has "an accuracy rate of approximately 95% [and] is, objectively, 'reliable.'" (Pet'rs' Br. 35.) Statistical reliability is irrelevant to the standard here. Whether a person resides somewhere does not turn on probabilities but rather specific facts. Section 6.50(3) requires "reliable information that *a* registered elector" has changed his residence. It is undisputed that there are thousands of voters for whom the data is inaccurate.[11] (Pet Br. 35–36.) Thus, ERIC data cannot be applied indiscriminately.

It remains the case that the statute does not deem ERIC data to be per se "reliable," and for good reason.

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[11] Petitioners concede a 4.3% "error" or "non-mover" rate for the 2017 ERIC data and mailing and a 2% "error" or "non-mover" rate for the 2019 ERIC data and mailing so far. (Pet'rs' Br. 35.) However, these percentages are the floor not the ceiling. Most electors—55% of those who were sent the 2019 mailing—have not provided any information about their voting address and may still confirm their current address at the polls in November. (Pet. App. 208.) Thus, so-called "additional verification"—like sending notice with a 30-day deadline for response—has proven ineffective in rooting out electors who have not actually changed their voting residence. (Pet'rs' Br. 34.)

c. Same-day registration is not a sufficient safeguard.

Petitioners seem to assert that their liberties with the statutory text should be overlooked because Wisconsin has election day registration.

That point is irrelevant to the statute's coverage in the first instance. Further, same-day registration is not the failsafe that Petitioners claim it is. In fact, it is no failsafe at all if in-person election day voting is dangerous for many given the ongoing pandemic. Further, even if a voter were to show up in person, he may come to the polls not knowing that he has been removed from the poll list and may not have the needed proof of residence—like a recent utility bill or paystub—to reregister. Even if the voter has a valid photo identification for purposes of voting, that identification would not necessarily provide proof of residence for registration purposes. *See* Wis. Stat. §§ 5.02(6m) (definition of "identification"), 6.79(2) (voting procedure), 6.34(3) (documents used to establish proof of residence).

Petitioners suggest that this grave harm of potential disenfranchisement is of no moment because of the greater harm, in their eyes, of possible voter fraud. They suggest that by not deactivating the voter registrations of ERIC Movers, the Commission is enabling improperly registered electors to commit voter fraud by voting at their former residence. (Pet'rs' Br. 8–9.) But Petitioners provide no evidence of this type of voter fraud. In any event, voter fraud is addressed by other laws. *See* Wis. Stat. § 12.13. ERIC is an information law, not a voter fraud law—it empowers voters by informing them of their status and potential need to reregister. Petitioners' attempt to use it for something the statutes do not state must be rejected.

II. Petitioners lack standing or a statutory right under section 6.50(3) for their challenge.

Petitioners suit has yet another flaw. They have made no showing that they have standing to bring their mass deactivation challenge. Section 6.50(3) does not provide a right of action for an individual elector to challenge another elector's voting registration status. Rather, to the extent an individual may challenge another voter's eligibility, that challenger must use separate statutory procedures and standards, not used by Petitioners here.

Standing requires two determinations: (1) Does the challenged action cause the plaintiff injury in fact? and (2) if so, it is within the "zone of interests" protected or regulated by the statute? *See Moedern v. McGinnis,* 70 Wis. 2d 1056, 1067, 236 N.W. 2d 240 (1975). Here, the answer to both questions is no.

First, Petitioners have suffered no injury as either taxpayers or voters. Petitioners simply cannot show that when another person's voter registration is not deactivated that affects *their* individual rights.

Taxpayer standing requires a showing "that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, *some pecuniary loss*; otherwise, the action could only be brought by a public officer." *S.D. Realty Co. v. Sewerage Comm'n*, 15 Wis. 2d 15, 21–22, 112 N.W. 2d 177 (1961) (emphasis added). That legal standard is not met by Petitioners' general allegation that any government agency staff time devoted to a supposed improper activity equates to an "illegal expenditure of taxpayer money." (Pet'rs' Br. 44.) Petitioners submitted no evidence that the Commission illegally expended public funds. Further, there is no legal authority for applying taxpayer standing to agency

staff's work. It would essentially render the "pecuniary loss" standard meaningless.

And the three individuals have no standing as voters either. They claim their voter standing derives from an administrative process and subsequent judicial review. However, that would not help them. They must have standing, no matter what. For example, under judicial review mechanisms, standing turns on whether a party was "aggrieved" by the agency decision on review. *See* Wis. Stat. §§ 227.52, 227.53. Petitioners cannot demonstrate that they were "aggrieved" by the Commission's failure to deactivate the registrations of other voters, and they have provided no evidence of voters improperly voting at the wrong location.

Further, this theory misconstrues the procedural history, anyway. They assert that they received an agency decision under Wis. Stat. § 5.06 and then appealed it under Wis. Stat. § 5.06(2). (Pet'rs' Br. 42.) However, subsection (2) contains no cause of action, and the Petitioners did not follow chapter 227's exclusive judicial review procedures.[12] *See* Wis. Stat. § 5.06(8), (9). That means this Court would lack

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[12] Petitioners contend they "did not appeal a decision of [the Commission] under Wis. Stat. § 5.06(8) because there was no decision on the merits by [the Commission] under § 5.06(6) for the Petitioners to appeal. Rather, they filed a circuit court action as allowed under § 5.06(2) where [the Commission] disposed of the case without a formal decision." (Pet'rs' Br. 42 n.13.) However, they provide no legal authority for the proposition that a person is excused from filing a ch. 227 petition for judicial review when an agency issues a final decision that does not reach the merits of the complaint. *See McEvoy by Finn v. Grp. Health Co-op. of Eau Claire*, 213 Wis. 2d 507, 530 n.8, 570 N.W.2d 397 (1997) (court declined to address undeveloped argument without citation to authority).

jurisdiction over any such claim. *See Kuechmann v. Sch. Dist. of LaCrosse*, 170 Wis. 2d 218, 223–24, 487 N.W. 2d 639 (Ct. App. 1992).

Second, even if Petitioners could demonstrate an injury in fact, they still would have no standing because they are not within section 6.50(3)'s "zone of interests." The statute provides no cause of action for an individual voter to challenge another voter's registration status, much less on a mass scale. Rather, different election statutes specifically provide a procedure to challenge an individual voter's status. Those challenges come with robust procedural protections for the challenged voter, including notice, an opportunity to be heard, and proof beyond a reasonable doubt. *See* Wis. Stat. §§ 6.48, 6.325. Petitioners fail to explain how those voters' rights can be completely ignored here. Of course, they cannot be. What Petitioners propose is not allowed under section 6.50(3). It is not within the zone of protected interests.

Petitioners have no standing or statutory right to bring their mass deactivation challenge under section 6.50(3). This Court may affirm the court of appeals' decision on this alternative basis. *See Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, 326 Wis. 2d 729, 744, 786 N.W.2d 78.

III. The writ of mandamus cannot form the basis for a contempt finding.

Because the writ of mandamus was improper and was correctly reversed, the Court need not address the second issue in this consolidated appeal, regarding the contempt ruling based on the writ. The Commission cannot be in contempt of a reversed order. However, for the sake of completeness, the following explains why the contempt ruling was erroneous.

Contempt is a "drastic and extraordinary" remedy. *Joint Sch. Dist. No. 1 v. Wis. Rapids Educ. Ass'n.*, 70 Wis. 2d 292, 317, 234 N.W.2d 289 (1975). Remedial contempt—the type of contempt issued here—may be "imposed for the purpose of terminating a continuing contempt of court." Wis. Stat. § 785.01(3). For a party's action to be punishable by contempt, a circuit court's order must be a specific directive to that party to act or refrain from acting. *Carney v. CNH Health & Welfare Plan*, 2007 WI App 205, ¶ 17, 305 Wis. 2d 443, 740 N.W.2d 625.

Petitioners imply that the Commission and three commissioners were held in contempt to punish them for their past actions. (Pet'rs' Br. 39–41.) However, that is not what happened here. (R. 93; 116.) Rather, the circuit court granted Petitioners' request to impose a remedial sanction for the purpose of terminating a continuing contempt of court on January 13, 2020. That ruling was in force for less than one day before the court of appeals stayed the ruling. (R. 93; 124; 125.) However, no sanctions would have accrued in that time. As the court of appeals explained, the circuit court was aware that the Commission was meeting the next morning, and "the circuit court would not have expected the Commission to comply with the purge order in the very short amount of time between the granting of the order in open court and [the court of appeals'] granting of the stay of the order the next morning just minutes before the Commission was to meet." (Ct. App. Decision ¶ 105.)

In any event, the writ of mandamus issued by the circuit court was not sufficiently clear to support contempt. The writ ordered the Commission to "comply with the provisions of § 6.50(3) and deactivate the registrations of those electors who have failed to apply for continuation of their registration within 30 days of the date the notice was mailed under that provision." (R. 77:2.) This general language

was not a clear directive to the Commission as to when, how, or who to deactivate. *See Carney*, 305 Wis. 2d 443, ¶ 17.

The writ did not clearly direct the Commission *when* to deactivate electors' registrations. The writ instructed the Commission "to comply with the provisions of § 6.50(3) *and* deactivate the registrations of those electors," but the statute provides no guidance on deactivation timing. It simply reads that "[i]f the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or board of election commissioners shall change the elector's registration from eligible to ineligible status." Wis. Stat. § 6.50(3). If the statute is otherwise properly triggered, an elector's registration status "shall" be changed—but the statute does not say how soon that must occur. *Id.* Rather, the 30-day period governs how long an *elector* has to respond to the notice mailed, not when the relevant *government entity* shall change an elector's status.[13] The statute thus directs no government entity to act immediately.

In addition, the writ did not clearly direct the Commission *how* it must "comply with the provisions of § 6.50(3) and deactivate" electors' registrations. Specifically, it did not address the notice, if any, that electors should receive before being deactivated. Section 6.50(3) contains a notice provision: "Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or board of election commissioners *shall notify the elector by*

[13] This can be contrasted to subsection (2), which directs that "the commission shall change the registration status of [the] elector from eligible to ineligible *on the day that falls 30 days after the date of mailing*." Wis. Stat. § 6.50(2). Subsection (3) contains no "on the day" language.

mailing a notice by 1st class mail to the elector's registration address stating the source of the information." The writ requires the Commission to "comply with" Wis. Stat. § 6.50(3), which could very well mean providing another notice *before* deactivating the registrations of any electors. Indeed, the circuit court's oral ruling included the statement, "I can't tell them how to do that. I don't know how to do that. They'll have to figure that out." (R. 131 (Mot. Hr'g. Tr. 76:12–16, Dec. 13, 2019) (emphasis added).) Contempt was not proper where the Commission had to "figure out" how to comply with the circuit court's directive.

Finally, the writ did not clearly notify the Commission *whose* registrations it must deactivate. Subsection 6.50(3), if applicable, would only require deactivation for some unknown subset of the electors: those who had moved *outside* their registered municipality. However, the Commission's October 2019 mailing was broader, including electors who may have moved *within* their registered municipality. That set of people are never deactivated under subsection 6.50(3).[14] The writ was thus unclear regarding which electors should be deactivated.

[14] Petitioners argue that the Commission should not have sent the mailing to intra-municipality movers because subsection 6.50(3) does not require that. (Pet'rs' Br. 40.) But, as discussed above, the October 2019 mailing was not designed to be a subsection 6.50(3) notice.

For multiple reasons, these circumstances cannot support a contempt finding.[15]

* * * *

This Court must reject Petitioners' efforts to mass-deactivate voters—while knowing full well that thousands of those voters will be improperly removed. That turns the ERIC data on its head. The system is designed to help people properly vote by empowering them with information, not to pull the rug out from under them. This effort is especially misguided because it asks the Court to abandon the fundamental principles that guide its decision-making: courts apply the statutory text. The Court should reject Petitioners' jettisoning of these important principles.

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[15] Further, there is no basis for contempt and remedial sanctions against the individual commissioner defendants. First, the individual defendants were not ordered to comply with the writ; only "Defendant Wisconsin Election Commission" was directed to act. (R. 77.) Second, individual commissioners cannot act separately from the Commission as an entity. Any action by the Commission requires the affirmative vote of two-thirds of the members. Wis. Stat. § 5.05(1e). Thus, by law it is impossible for the individual commissioners to deactivate electors' registrations. And the "inability to obey that order is a defense to contempt." *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2010 WI 44, ¶ 79, 324 Wis. 2d 703, 783 N.W.2d 294.

CONCLUSION

This Court should affirm the decision of the court of appeals.

Dated this 29th day of June 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,937 words.

Dated this 29th day of June 2020.

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 29th day of June 2020.

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